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# Law Firm General Counsel as Sherpa: Challenges Facing the In-Firm Lawyer's Lawyer

Susan Saab Fortney\*

## I. INTRODUCTION: THE EMERGING ROLE OF LAW FIRM GENERAL COUNSEL

Although lawyers have practiced in group settings for decades, lawyers are generally independent by nature. Referring to the independent nature of lawyers, commentators have compared managing lawyers with herding cats.<sup>1</sup> That analogy appears to fit. Cats, as well as lawyers, can be unyielding and self-centered. In attempting to oversee such independent creatures, managing lawyers may serve as teachers, mentors, negotiators, counselors, or dictators. These roles and the changing legal and business environment challenge even the most skillful manager.

To tackle these challenges, more and more firms are taking the advice that they give their clients—firms are using the services of a lawyer. Rather than retaining outside counsel, firms are increasingly designating in-firm lawyers to serve as general counsel.<sup>2</sup> Observers suggest that the growing trend among law firms to appoint general counsel comes from a “more established trend toward naming an in-house risk manager for assessment of potential malpractice problems, combined with today’s in-

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\* Susan Saab Fortney, George H. Mahon Professor of Law, Texas Tech University. Special thanks to Associate Dean Ellen E. Sward, John H. & John M. Kane Professor of Law Michael H. Hoeflich, and the members of the University of Kansas Law Review for inviting me to participate in this worthwhile symposium on law firm general counsel. I also appreciate the inspiration and insights provided by Geoffrey C. Hazard, Jr., Trustee Professor of Law, and the other symposium participants.

1. Using the metaphor of “herding cats,” one commentator explains that firm lawyers tend to operate in their own fiefdoms and that “law firms tend to be a collection of lone rangers.” Holly English, *The Value of Shared Values*, TEX. LAW., Feb. 28, 2000, at S8. In discussing lawyers’ resistance to formalized procedures, Susan Hackett, Vice President and General Counsel of the Association of Corporate Counsel, notes that “lawyers are a difficult bunch of cats to herd.” *In-House Counsel Must Take Initiative on Tackling Risk Management Issues*, 20 LAWS. MAN. ON PROF. CONDUCT (ABA/BNAL), at 126 (Mar. 10, 2004).

2. See Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335, 346 (2003) (referring to “anecdotal evidence” that large law firms increasingly rely on in-house specialists to manage firm compliance with professional regulations) [hereinafter Chambliss & Wilkins, *New Framework for Firm Discipline*].

creased demands on firm managers for counsel on everything from employment law to election law.”<sup>3</sup> As explained by Robert Creamer, Vice President and Loss Prevention Counsel at the Attorneys’ Liability Assurance Society (ALAS), the need for the position of ethics counsel or general counsel arose from the need for claims management.<sup>4</sup> As law firms grew in the 1990s, this need increased significantly, as firms needed a single person to work with the firm’s insurer, to retain and monitor outside counsel, and to oversee discovery.<sup>5</sup> Firms may also have been motivated by a desire to protect confidential discussions concerning potential claims, while reducing fees paid to outside counsel.<sup>6</sup>

Survey results reflect this growing trend among law firms to appoint full-time general counsel. According to a recent *American Lawyer* survey of the 200 largest firms, 62.5% of respondents indicated that their firms had designated a general counsel.<sup>7</sup> Another 9.5% indicated that they intended to designate someone in the next twelve months.<sup>8</sup>

A 1995 survey that I conducted of all Texas firms with over ten lawyers revealed that Texas firms were participating in the national trend to appoint in-house counsel.<sup>9</sup> In my study, 73% of respondents indicated that their firms had appointed a principal or committee to handle ethics or malpractice problems.<sup>10</sup> Because only 61% of firms had appointed a principal or committee to handle risk management and quality assurance matters, I suggested that firms may be more inclined to designate individuals to handle ethics and malpractice problems that arise rather than to rely on risk managers to address problems before they arise.<sup>11</sup>

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3. Gary Taylor, *Counsel to Firms Goes In-House*, NAT’L L.J., July 18, 1994, at A1.

4. *Center Update*, 15 PROF. LAW., Spring 2004, at 8. At the 30th ABA National Conference on Professional Responsibility, Mr. Creamer joined other experts in a panel discussion of the role of law firm ethics and general counsel in the post-Enron world.

5. *Id.* (noting that the ALAS best practices policies includes a variety of best practices that Robert Creamer has developed for law firm general counsel).

6. Daniel B. Kennedy, *New Trend is General Counsel in Firms*, A.B.A. J., Jan. 1995, at 29.

7. The legal consulting firm, Altman Weil, Inc. conducted the survey in February 2004. Fifty-six firms out of 195 responded, resulting in a response rate of 29%. For more information on the survey, see Altman Weil, Inc., *Results of a Confidential “Flash” Survey on Law Firm General Counsel*, at <http://www.altmanweil.com/pdf/LawFirmGCsurvey.pdf> (last visited Mar. 17, 2005) [hereinafter *Altman Weil Survey*].

8. *Id.*

9. Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271, 289 (1996). For a description of the methodology and respondents’ general profile, see *id.* at 277–80.

10. *Id.* at 289.

11. The results also suggested that larger firms are more likely than smaller firms to appoint a firm principal or committee to handle ethics and risk management matters. *Id.*

Firms use different titles when referring to in-firm lawyers who handle firm compliance and ethics matters. In in-depth analysis based on interviews with thirty-two in-firm compliance specialists, Professors Elizabeth Chambliss and David B. Wilkins discuss the wide variation in the specialists' titles and roles.<sup>12</sup> In evaluating the functional roles of the compliance specialists, Professors Chambliss and Wilkins determined that "titles corresponded only loosely to their functional roles."<sup>13</sup>

The functional roles of the specialists, like their titles, vary substantially from firm to firm. Typically, in-house specialists monitor the engagement of outside counsel and handle professional responsibility and liability concerns.<sup>14</sup> While firm counsel may handle a wide range of other legal issues such as employment and general liability issues, some limit their work to ethics matters.<sup>15</sup> Given this variety in titles and roles, in this article I use the term "general counsel" to refer to an in-firm lawyer who advises the firm and its lawyers regarding the firm's general legal concerns, not limited to ethics matters.

When firm principals designate a general counsel they recognize that the complexities of organizational practice merit investing in a lawyer to focus on the firm's legal concerns.<sup>16</sup> The effectiveness of the appointed

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12. In Professors Chambliss's and Wilkins's study of thirty-two firms, the following titles were used by participants: general counsel or attorney to the firm (ten participants), ethics advisor or professional responsibility advisor (seven participants), conflicts partner or chair of the conflicts committee (four participants), risk management or loss prevention partner (three participants), pro bono partner or pro bono coordinator (three participants), and ombudsman (one participant). Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 2002 ARIZ. L. REV. 559, 565-66 (2002) [hereinafter Chambliss & Wilkins, *Compliance Specialists*].

13. *Id.* at 566. In the interviews, participants emphasized the "evolutionary" nature of their work. *Id.* at 565.

14. In the Altman Weil, Inc. survey, the largest percentages of respondents indicated that general counsel serve or advise firms in the following areas: engagement of outside counsel (91.18%), professional liability issues (91.18%) and professional responsibility issues (88.24%). *Altman Weil Survey*, *supra* note 7, at 8.

15. Based on survey information, Professors Chambliss and Wilkins conclude that handling conflicts of interest, in-take and lateral hiring issues appear to be the primary substantive jurisdiction for most in-house compliance specialists. Chambliss & Wilkins, *Compliance Specialists*, *supra* note 12, at 565. For a discussion of the need for in-house ethics advisors and the practical benefits of such advisors, see Jonathan M. Epstein, *The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm*, 7 GEO. J. LEGAL ETHICS 1011, 1013-1038 (1994). For personal accounts of two firm ethics advisors who share a broad conceptualization of their role and work, see generally Peter R. Jarvis & Marc J. Fucile, *In-House Legal Ethics Practice*, 14 NOTRE DAME J. L. ETHICS & PUB. POL'Y 103 (2000).

16. Based on their research suggesting that in-house compliance specialists in thirty-two firms play a "significant role in promoting ethical awareness and the quality of work within firms." Professors Chambliss and Wilkins persuasively argue for requiring firms to designate at least one partner as the firm's compliance specialist. Chambliss & Wilkins, *A New Framework for Law Firm Discipline*, *supra* note 2, at 347-49.

person will largely turn on the general counsel's conceptualization of his/her own role, as well as the support of managing and influential firm principals.<sup>17</sup>

Some general counsel tend to be reactive, focusing on external challenges such as legal malpractice claims and government regulations.<sup>18</sup> As revealed in the Altman Weil survey, the vast majority of general counsel devote their attention to professional liability issues and the engagement of outside counsel.<sup>19</sup> Faced with increasing liability exposure, many firms recognize the value of identifying one firm lawyer to monitor complex professional liability cases against the firms and their lawyers. Even before a claim is actually asserted, the designation of firm counsel improves the likelihood that in-firm communications may be protected from discovery.<sup>20</sup> Beyond monitoring litigation and managing discovery made in connection with pending litigation, the in-house counsel may also assist the firm in responding to other demands for information, such as government subpoenas.<sup>21</sup>

General counsel also play a significant role in directing firm efforts to comply with statutes and regulations such as Sarbanes-Oxley and the standards of practice adopted pursuant to that legislation.<sup>22</sup> Regardless of

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17. See Chambliss & Wilkins, *Compliance Specialists*, *supra* note 12, at 582 (explaining that participants agreed that "the most important source of credibility for full-time and practicing specialists is the visible support of firm leaders").

18. In-house compliance lawyers who are compensated directly for their in-house compliance work "tend to play a much broader and more proactive role in their firms." *Id.* at 574.

19. According to the survey, 91.18% of respondents indicated that they advise their firms on engagement of outside counsel and 91.18% indicated that they advise their firms on professional liability issues. *Altman Weil Survey*, *supra* note 7, at 8.

20. Depending on the circumstances, the firm may maintain that communications are protected as work-product and/or attorney-client communication. For attorney-client privilege to apply, the communication must be made to facilitate the rendition of legal services, rather than routine business advice. GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 258 (4th ed. 2005). Within law firms, the privilege may not apply if the consultation with in-house counsel creates a conflict of interest between the law firm's fiduciary duties to the client seeking to discover the communications. For a critical review of the cases and rules that apply to protection of communications between in-firm counsel and firm lawyers, see Elizabeth Chambliss, *The Scope of In-Firm Privilege*, *NOTRE DAME L. REV.* (forthcoming 2005). For recommendations on steps that firms can take to improve the likelihood that courts will protect internal firm communications, see Douglas R. Richmond, *Law Firm Internal Investigations: Principles and Perils*, 54 *SYRACUSE L. REV.* 69, 104-07 (2004).

21. As illustrated by the enforcement actions that the Internal Revenue Service (IRS) brought against the law firms of Jenkins & Gilchrist and Sidley Austin Brown & Wood, resisting government demands for information requires a great deal of time, money and fortitude. For a description of the enforcement actions arising out of IRS demands for tax shelter information from the law firms, see Brenda Sapino Jeffreys, *Enforcement Action Against Sidley May Put Privilege to the Test*, *TEX. LAW*, Apr. 12, 2004, at 5.

22. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 28 and 29 U.S.C.). Section 307 of Sarbanes-Oxley directed the U.S.

whether a firm includes corporate and securities lawyers to direct the firm's response to legislation and regulations, a general counsel can assist the firm in formulating policies and procedures to comply with the legislation and regulations.<sup>23</sup>

Similarly, a general counsel should be prepared to work with tax lawyers in evaluating the firm's response to new standards of conduct adopted by the U.S. Department of Treasury.<sup>24</sup> Newly amended Treasury Department Circular 230 provides stricter rules for tax professionals. Under the newly adopted standards, tax practitioners may be subject to monetary penalties, as well as discipline for violations of the rules of practice.<sup>25</sup>

Beyond responding to external challenges, such as malpractice claims and government regulation, proactive counsel should act as the firm's legal counselor in identifying concerns to avoid problems before they arise.<sup>26</sup> This article will discuss various challenges facing firm managers and the role that proactive general counsel play in addressing those challenges.

## II. FIRM STRUCTURE

For many years, law firm partners practiced in a collegial environment. Firms functioned as general partnerships in which firm owners shared profits and losses. The dynamics of private law practice changed with changes in firm structures and compensation systems. With the adoption of state legislation allowing professionals to operate in limited liability firms, many lawyers abandoned the traditional general partner-

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Securities and Exchange Commission (SEC) to issue rules "setting forth minimum standards of professional conduct for attorneys appearing and practicing before" the SEC. 116 Stat. at 784. Pursuant to this directive, the SEC proposed 17 C.F.R. Part 205, entitled "Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issue" (SEC Standards).

23. For a discussion of law firm response to Sarbanes-Oxley, see Susan Saab Fortney, *Chicken Little Lives: The Anticipated and Actual Effect of Sarbanes-Oxley on Corporate Lawyers Conduct*, 33 CAPITAL L. REV. 61 (2004). In firms that do not handle securities work, general counsel should revise form engagement letters and audit response letters to clarify that the firm is not acting as securities counsel. *Id.*

24. I.R.B. 2004-52, Dec. 17, 2004.

25. Sidney Kess, *Tax Tips*, N.Y. L. J., 1-2 (Jan. 3, 2003).

26. See *Center Update*, PROF. LAW. 10 Summer 1999, at 10 (summarizing a panel discussion on positive contributions made by proactive ethics counsel). See also Susan Saab Fortney, *Ethics Counsel's Role in Combating the "Ostrich" Tendency*, 2002 PROF. LAW., 131 (2002) [hereinafter Fortney, *Ethics Counsel's Role*] (drawing on data from an empirical study on law firm culture and billing expectations to illustrate the work of proactive ethics counsel in building the firm's ethical infrastructure).

ship structure.<sup>27</sup> By converting to some limited liability form, firm partners attempted to shield their personal liability for acts and omissions of other firm lawyers.<sup>28</sup>

Although many firms jumped on the limited liability bandwagon, some firms resisted, questioning the long term effect of firms operating as limited liability firms.<sup>29</sup> One concern relates to the negative effect on monitoring within law firms. Most obviously, the elimination of vicarious liability destroys the most powerful incentive for firm partners to invest in monitoring. In addition to eliminating vicarious liability, limited liability statutes that impose supervisory liability can actually undermine principals' willingness to act as supervisors and monitors.<sup>30</sup> Such statutes effectively shift liability exposure from all firm equity holders to those lawyers who graciously act in some supervisory capacity. Clearly, this can contribute to lawyers' reluctance or refusal to accept supervisory and management responsibilities, including service on such oversight committees as opinion review committees.<sup>31</sup>

Many firm general counsel already advise the firm on matters related to firm structure such as partnership, professional corporation, and limited liability partnership issues.<sup>32</sup> Beyond consulting the firm on organizational documents such as partnership agreements, a general counsel should assist the firm in addressing the negative aspects of converting to

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27. Once states adopted legislation allowing lawyers to practice in limited liability partnerships and limited liability companies, many firms immediately converted to limited liability status in the late 1990s. The corporate collapses in 2002 and the growing concern that firm partners could face crushing liability not covered by malpractice insurance renewed lawyers' interest in structures to limit their liability. In the second wave of conversions, large firms that had resisted the limited liability lure acquired limited liability status. See Anthony Lin, *Several Prominent N.Y. Firms Move to Limit Liability*, N.Y.L.J., Jan. 9, 2003, at 1 (noting that both Sullivan & Cromwell and Paul Weiss, Riskind, Wharton & Garrison converted to LLPs, "ending a combined 250 years of operation as general partnerships").

28. The actual shield will depend on the provisions of the applicable state statutes. For charts and commentary on state variation, see ALAN R. BROMBERG & LARRY E. RIBSTEIN, *LIMITED LIABILITY PARTNERSHIPS & THE REVISED UNIFORM PARTNERSHIP ACT* (2004).

29. Firms that resisted changing their structures largely remained general partnerships out of a sense of tradition and a fear of eroding trust and collegiality among partners. Lin, *supra* note 27. Firm partners also may be concerned that the restructuring to limited liability status might somehow communicate that you don't stand behind your work. See Otis Bilodeau, *Big-Firm Partners Worry About Liability Restructuring is a Hot Topic Again.*, NAT'L L.J., June 17, 2002.

30. For a critique of statutory provisions that impose liability on supervisors, see Robert R. Keatinge, *The Floggings will Continue Until Morale Improves: The Supervising Attorney and His or Her Firm*, 39 S. TEX. L. REV. 279 (1998).

31. Susan Saab Fortney, *Seeking Shelter in the Minefield of Unintended Consequences—The Traps of Limited Liability Law Firms*, 54 WASH. & LEE L. REV. 717, 732–37 (1997).

32. The Altman Weil, Inc., Survey on law firm general counsel revealed that 64.71% of the respondents handle partnership, professional corporation, limited liability corporation, or limited liability partnership issues. *Altman Weil Survey*, *supra* note 7, at 8.

liability structures. Specifically, general counsel can assist firms in fashioning approaches to deal with the unwillingness of lawyers to serve in supervisory capacities. For example, general counsel can propose partnership provisions to indemnify supervisors and managers for losses they suffer.<sup>33</sup> To address concerns of supervisors, general counsel can recommend high levels of insurance or special insurance to protect the supervisors and managers. Presumably, principals will continue to invest in supervision in order to protect the firm. The interest in protecting the firm would be more compelling if lawyers were committed to firms. Unfortunately, in a mobile legal community, the interest in protecting the firm may be secondary to individual partner's self-interest.

Firm partners should recognize that a limited liability structure may adversely affect firm stability. In a general partnership, partners may not be able to escape liability by changing firms. In a limited liability firm, lawyers who are not personally liable for a large malpractice judgment will be motivated to jump ship and change firms because paying off the judgment in excess of available insurance would drain off future profits.<sup>34</sup> The ability of principals to jump ship to escape paying a judgment in excess of insurance coverage may depend on the nature of the claim. Again, general counsel can play a valuable role in advising firms on the consequences of converting to limited liability structures and how firms can cultivate commitment among partners.

Finally, firms that elect limited liability status need a designated lawyer to monitor compliance with applicable legislation in all jurisdictions where firm lawyers practice. In addition to overseeing such compliance, the general counsel can also assist the firm and its lawyers in avoiding conduct which could jeopardize limited liability protection.<sup>35</sup>

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33. If all partners must indemnify supervisors and managers, each partner is effectively vicariously liable for acts and omissions of supervisors and managers serving in those capacities. This approach is different than across the board indemnification for all firm principals.

34. See Susan Saab Fortney, *High Drama and Hindsight: The LLP Shield, Post-Anderson*, BUS. L. TODAY, Jan./Feb. 2003, at 49 (comparing the exodus of partners in Arthur Anderson, L.L.P. to the agreement of Kaye Scholer partners to personally pay \$16 million to settle the government's claims arising out of the failure of Lincoln Savings & Loan Association).

35. For a discussion of various common law theories and equitable principles that a plaintiff could use in trying to bust the limited liability protection, see Susan Saab Fortney, *Professional Responsibility and Liability Issues Related to Limited Liability Law Partnerships*, 39 S. TEX. L. REV. 399, 430-39 (1998).



### III. RETHINKING FIRM COMPENSATION SYSTEMS

Commentators and law firm consultants report that firm lawyers devote more time to talking about each other's compensation than any other management or practice topic.<sup>36</sup> Despite this attention and interest, the method for determining compensation and the amount of compensation continue to be two of the most challenging management issues law firms face.<sup>37</sup>

To meet this challenge, firms have explored and adopted new compensation systems. Many firms have abandoned traditional lock-step compensation systems based on seniority, moving toward objective compensation systems based on formulas. Formulaic or "scorecard" systems base principal compensation on values assigned to various criteria such as business origination and fees collected.<sup>38</sup> Other firms use a more subjective approach to assessing and rewarding principals' contributions. Whether a firm uses a subjective, objective or hybrid approach to compensation, firm leaders should carefully consider the consequences of adopting one approach or another.

A general counsel can help firm leaders appreciate the role that compensation systems play in causing people to behave in ways that they are measured and paid. In counseling the firm, the general counsel should urge decision-makers to adopt compensation systems that reflect and support the firm's business plan, philosophy, culture, and values.<sup>39</sup> Firms that want to cultivate a team-based practice should avoid "eat what you kill" compensation systems that reinforce "lone ranger" behavior.<sup>40</sup>

Basing a significant percentage of compensation on client origination and billings may also contribute to lawyers cutting corners in an effort to keep clients.<sup>41</sup> Retaining the client may benefit the individual lawyer in

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36. See, e.g., H. Edward Wesemann, *10 Terrible Truths About Law Firm Partner Compensation*, OF COUNS., Apr., 2002, at 10, 10 ("[M]ore time is spent talking about . . . compensation than any other . . . topic.").

37. See John W. Olmstead, *Beyond Eat-What-You-Kill: Determining Partner Compensation*, 91 ILL. B. J., 575, 575 (noting that confidential interviews reveal partners are "more dissatisfied with the method used to determine compensation than with the amount of compensation itself").

38. *Id.* at 576.

39. Peter J. Winders, *Unintended Consequences (The Essence of Law Firm Management)* PROF. LAW., Spring 2003, at 47 (suggesting that compensation system decisions turn on lawyer contributions to law firm core values).

40. Olmstead, *supra* note 37, at 575.

41. For a theoretical discussion of how "eat what you kill" systems create incentives for lawyers to not act in client interest because of the fear of losing the client, see Edward A. Bernstein, *Structural Conflicts of Interest: How a Law Firm's Compensation System Affects Its Ability to Serve Clients*, 2003 U. ILL. L. REV. 1261, 1263-74 (2003) (urging the adoption of a provision requiring law firms to disclose their partner compensation systems).

the short-run, but hurt the firm in the long-run. In cautioning firms against adopting compensation systems that operate at cross-purposes with the firm's risk management objectives, James Jones of Hildrebrand Consulting, explains that "a compensation system that rewards only client originations or billings and takes no account of a partner who saves the firm from significant risk by withdrawing from a client matter is a system that disincentivizes lawyers to act in the firm's best interest."<sup>42</sup>

Firm compensation systems that do not recognize management and supervision time also run counter to firm interest. Consider a firm whose compensation system is principally based on objective measures such as billable hours and business generation. Operating in such a system, self-interested lawyers will be hard pressed to devote time to supervision when they could be clocking billable hours and generating income and business. These lawyers will tend to minimize their supervision time, without considering the long-term and firm-wide implications. As suggested by Professors David B. Wilkins and G. Muti Gulati, an objective compensation system can lead to rationing time devoted to supervision and monitoring because "time spent training is time that the partner cannot spend either producing revenue or consuming leisure."<sup>43</sup> Compensation systems should encourage, rather than discourage, lawyers to spend time providing supervision and making other contributions that are beneficial to the firm.

A system that does not reward supervision time on an equal basis as billings and business generation effectively punishes the lawyer-supervisor.<sup>44</sup> First, the supervisors do not receive short-term monetary rewards for their contributions to the firm. Second, supervisors suffer because the time devoted to supervision and management activities competes with the time that they could spend building their own portable client base. In this sense, supervision time hurts the supervisor's mobility.<sup>45</sup>

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42. James W. Jones, *Law Firm Management*, N.Y. L. J., Feb. 11, 2003, at 5.

43. See David B. Wilkins & G. Muti Gulati, *Reconceiving the Tournament of Lawyers: Tracking Seeding and Information Control in the Labor Markets of Elite Law Firms*, 98 VA. L. REV. 1581, 1617 (1998) (explaining that partners have "suboptimal incentives to contribute to the production of [training as a] firm-wide benefit.").

44. Fortney, *Ethics Counsel's Role*, *supra* note 26, at 148 (describing how compensation systems undermine principals' willingness to devote time to supervision and training).

45. "Top lawyers may also be *unwilling* to devote considerable time to management, recognizing that they stand to benefit more from portable assets like client relationships and substantive legal skills than from firm-based assets like efficient management structures and sound financial practices." Deborah K. Holmes, *Learning from Corporate America: Addressing Dysfunction in the Large Law Firm*, 31 GONZ. L. REV. 373, 404 (1995-96).

Rather than punishing supervisors, a compensation system should adequately compensate supervision time as a kind of firm-based asset.<sup>46</sup> The compensation system can recognize supervision time by giving the same credit for supervision hours as it does for collected hours, using an average billing rate.

Partners' resistance to treating supervision time on the same basis as collected time could be overcome if partners recognize the financial rewards associated with good supervision and training. First, supervision and training improves quality and client satisfaction. Second, supervision and training translates to dollars saved in malpractice premiums and losses.<sup>47</sup> Data from insurers reveal that monitoring mechanisms pay off in both defense costs and indemnity payments.<sup>48</sup> If monitoring prevents claims from being brought, the firm saves its deductible and future premium surcharges, and avoids the loss of time and future business associated with a malpractice claim. Third, good supervision translates into huge cost savings if the firm is able to retain good associates with partnership potential. Current industry estimates show that "attrition-related costs can range from \$200,000 to \$500,000 every time a firm has to replace a second- or third-year associate."<sup>49</sup> These tangible costs, as well as intangible costs of attrition, could be avoided if firms addressed reasons why associates change employers. Various studies have shown that lack of supervision, training, and mentoring are frequently cited reasons

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46. If a firm values supervision and training, which contributes to the well being of the entire firm, then the firm should recognize the importance of compensating supervisors and managers. If partners are concerned that a partner may fudge on supervision time recorded, the firm could set annual maximums for supervision time to be calculated into the objective portion of the compensation system. The annual maximum could vary depending on the position that the supervisor holds. A member of a firm's ethics committee may have a higher annual maximum than a member of the firm's retention committee. Peer review could also be used to monitor supervision time. With peer review, reviewers could seek information from lawyers who work with the supervisors. For a description of one firm's experience in asking associates for information on their supervising partners, see Susan Saab Fortney, *Am I My Partner's Keeper? Peer Review in Law Firms*, 66 U. COL. L. REV. 329, 367 (1995).

47. See John A. Edginton, *Managing Lawyers' Risks at the Millennium*, 73 TUL. L. REV. 1987, 1992-94 (1999) (noting that lack of proper supervision of junior lawyers is a "major area giving rise to malpractice claims").

48. According to a Louis Harris survey of 395 U.S. law firms that employ 35 or more lawyers, firms that "designated a risk-management partner or committee paid out more than \$1,000,000 less for the largest claim that they resolved over the past five years." *LOMAR NEWS, Briefs*, 97-11 LAW OFF. MGMT. & ADMIN. REP. 8 (1997). According to the same survey, firms that designated "a separate partner or committee to oversee the acceptance of new clients and engagements, on average, paid out approximately \$800,000 less for their largest claim." *Id.*

49. Patti Gilgio, *Rethinking the Hours: New Push on Workplace Flexibility Aims to Put Life on the Agenda, With No Penalty*, LEGAL TIMES, Nov. 8, 2004, at 33 (quoting Joan Williams, Director of the Program on WorkLife Law at American University's Washington College of Law and Co-director of the Project on Attorney Retention).

for associates leaving firms.<sup>50</sup> General counsel could use this information in urging firm leaders to rethink firm compensation systems that undermine lawyers' willingness to devote time to supervision and training.

#### IV. PERSONNEL TIME BOMB

Investing in supervision and training may also prevent certain personnel claims. An involved supervisor may be able to identify problem employees and to take remedial measures to address concerns, short of terminating associates or support staff. Through monitoring, a supervisor can learn which employees are keepers and which ones are not. As discussed above, senior lawyers who function in an objective compensation system may ration the time they devote to supervisory activities. Firm managers and senior lawyers who do not closely monitor associate work may rely on billable hour production as the main criterion for promoting and compensating associates.<sup>51</sup> Based on commentary and my own study findings on the effects of firm culture and increasing billable hour expectations, I have suggested that "quantifying" firm contributions may provide ammunition in employment claims brought by disgruntled associates.<sup>52</sup> This is illustrated by a discrimination claim brought by a female associate in the Dallas-based firm of Hughes & Luce after the firm did not promote her to partner.<sup>53</sup> The associate asserted that she met the firm's objective criteria for partnership, the hours and the years, but

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50. As stated in the overview of findings of a large national study on associate attrition, the decision of associates to stay or leave a firm was "most frequently affected by the amount of feedback, the quality of lawyer management, the availability of mentoring, the amount of communication with the partnership, and the unspoken firm policy on the balance of law practice and life. NALP FOUND. FOR RES. & EDUC., KEEPING THE KEEPERS: STRATEGIES FOR ASSOCIATE RETENTION IN TIME OF ATTRITION 14 (Jan. 1998).

51. In criticizing the reliance on billable hour production to measure success, Dean Anthony Kronman states:

The increased emphasis on hours billed as a criterion for measuring associate performance—which reflects in part the cultural devaluation of other attributes less directly connected to the external good of money-making and in part the administrative need for a uniform quantitative standard of evaluation in firms whose size make more-qualitative criteria unworkable—has in turn propelled the competition of associates more and more in this direction. Increasingly, associates at large firms themselves equate success—promotion and prestige—with hours billed.

ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 302 (1993).

52. Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 275–76 (2000).

53. Angela Ward, *A Court-Ordered Partner? Hughes & Luce Associate Seeks Unusual Ruling*, TEX. LAW., Aug. 2, 1999, at 1.

was nevertheless denied the partnership trophy.<sup>54</sup> Such claims may become more common as firms move toward emphasizing billable hour production and other objective criteria. Before such claims are brought, general counsel can advise the firm on avoiding situations that contribute to such claims.

As in-house counsel in corporations devote a good deal of their time to handling personnel claims and employment litigation,<sup>55</sup> I predict that in the next decade personnel matters within law firms will present a major challenge for in-house general counsel.<sup>56</sup> As illustrated by the multi-million dollar judgment against Baker & McKenzie based on a legal secretary's sexual harassment claim, firms are attractive targets for discrimination and sexual harassment claims.<sup>57</sup> In reducing the jury award from \$6.9 million to \$3.5 million, the trial court stated that the reduced award accomplished the "plaintiff's purpose of 'lighting a fire' under Baker & McKenzie."<sup>58</sup>

The award in the Baker & McKenzie case and other large verdicts underscore the vulnerability of firms.<sup>59</sup> The size of the awards suggests that jurors believe that "lawyers and their firms should be held to a higher level of scrutiny because they should know the law."<sup>60</sup> At the same time, various economic and sociological factors, including the deep pockets of firms and fading institutional loyalty, will likely contribute to an explosion of employment claims.<sup>61</sup>

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54. Although her latest performance evaluation at the firm described Julie Blend as "personable, practical, [has] good client skills, [and] shows initiative," she was passed over for partner three years in a row. *Id.* In the civil case against the firm, the associate was successful in obtaining an order compelling the firm to produce internal firm documents relating to inner firm workings such as performance evaluations and partnership votes. Rather than producing the documents, the firm settled the case. Jenny Burg, *Discrimination Case Against Hughes & Luce Settles*, TEX. LAW., May 1, 2000, at 1-2.

55. According to a survey of 300 in-house lawyers who responded to Fulbright's U.S. Corporate Counsel Litigation Trends Survey, respondents worry most about employment litigation and contract disputes. Brenda Sapino Jeffreys, *In-House Texas GCs Worry About Employment, Contract Disputes*, TEX. LAW., Sept. 6, 2004, at 1.

56. In the 2004 Altman Weil, Inc. Survey on Law Firm General Counsel, 52.94% of the respondents indicated that they advised their firms on employment law matters, including discrimination, harassment, terminations, and compensation matters. *Altman Weil Survey*, *supra* note 7, at 8.

57. See Philip M. Berkowitz, *Discrimination and Law Firms*, N.Y.L.J., Mar. 14, 2002, at 5.

58. *Id.*

59. See generally, *id.* (describing firm vulnerabilities).

60. Danielle L. Hargrove & Cynthia L. Young, *We're Not Above the Law*, 56 OR. ST. B. BULL. 23, 23-24 (1996). In 1994, a Massachusetts jury awarded \$3.2 million to a former firm administrator of the Boston firm of Hutchins, Heetler & Dittmar. The administrator successfully argued that after he developed multiple sclerosis that the firm violated state discrimination laws by discharging him rather than making reasonable accommodations. *Id.*

61. See *id.* at 23 (noting that high associate salaries make employment claims attractive to contingent fee lawyers).

Plaintiffs in employment cases against law firms may assert common law as well as statutory claims. Since a 1986 decision concluding that the decision to promote an associate to partnership status is an employment decision, numerous associates have sued under the Civil Rights Act of 1964.<sup>62</sup> More recently, firm partners have claimed protection under the Age Discrimination in Employment Act (ADEA). In January 2005, the Equal Employment Opportunity Commission (EEOC) sued Sidley Austin Brown & Wood, one of the world's largest law firms, alleging "that the firm practiced age discrimination in demoting or forcing the retirement of older partners."<sup>63</sup> "The EEOC's suit is based on what experts in the employment law field say is a novel claim that the lawyers demoted by Sidley in 1999 held the title of partner but were, in effect employees of the firm."<sup>64</sup> As suggested by an employment law expert and a law firm consultant, the EEOC litigation, if successful, may force firms nationwide to examine their "governance, compensation, and partnership involvement," as well as their "management structure."<sup>65</sup> In this evaluation process, firm general counsel should play a central role.

To avoid employment claims, general counsel can instigate, conduct or oversee an audit of employment practices within the firm. In conducting such an audit or review, general counsel could obtain the assistance of in-firm lawyers with employment expertise or retain outside counsel.<sup>66</sup>

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62. *E.g.*, *Mungin v. Katten Muchin & Zavis*, 941 F. Supp. 153, 155 (D.D.C. 1996) (action by an African-American lawyer who obtained a \$1.5 million punitive award for race discrimination by his firm), *rev'd* 325 U.S. App. D.C. 373 (D.C. Cir. 1997) (reversed and remanded for insufficient evidence to support the \$1.5 million verdict). Female associates have also filed pregnancy discrimination cases against their firm employers. John Council, *Motherhood at the Firm, Former Associate Alleges Jenkins & Gilchrist Discriminated Against Her Because of Pregnancy*, TEX. LAW., Mar. 29, 2004, at 1. Law firms abroad have also been hit with large discrimination awards. Becky Barrow, *Women Lawyers May Get Pounds 7m in Sex Case Victory*, DAILY TELEGRAPH, Dec. 23, 2003, at 8.

63. Anthony Lin, *EEOC Sues Sidley for Age Discrimination: If Agency Wins, Firms May Be Forced to Rethink Management Structures*, LEGAL TIMES, Jan. 17, 2005, at 1. For a comment analyzing the claims of thirty-two Sidley Austin partners who sued the firm for violations of the ADEA, see Leonard Bierman & Rafael Gely, *So, You Want to be a Partner at Sidley & Austin?* 40 HOUS. L. REV. 969 (2003). Because courts have reached different conclusions on whether a firm partner or shareholder is an "employee" for the purposes of federal anti-discrimination statutes, commentators have recommended amending federal statutes to clarify who is a covered employee. See, e.g., Stephanie M. Greene & Christine Neylon O'Brien, *Partners and Shareholders as Covered Employees Under Federal Antidiscrimination Acts*, 40 AM. BUS. L. J. 781, 783 (2003) ("This article advocates that Congress revisit the definition of 'employee' under federal antidiscrimination statutes in light of the diversity of judicial opinions on the issue and the proliferation of new business forms."). Until such time that the reach of the statutes is clarified by the courts or Congress, firms will continue to be subject to claims by disgruntled partners.

64. Martha Nell, *Who is a Partner?*, A.B.A. J., June 2005, at 34, 36.

65. Lin, *supra* note 63, at 8 (quoting Lisa Smith, "a legal management consultant at the D.C. office of Hildebrandt International," and William Kilberg, "an employment specialist at the D.C. office of Gibson, Dunn & Crutcher").

66. For suggestions for firms taking a proactive posture in conducting "an audit of employment

The audit or review could include the following steps recommended by two employment law experts: (1) Enact non-discrimination policies; (2) follow investigative procedures; (3) implement leave of absence policies; (4) implement arbitration or mediation policies for employment disputes; (5) follow formal evaluation processes; (6) train attorneys; (7) standardize partnership decisions; (8) enact anti-fraternization policies; and (9) ensure compliance in multiple offices.<sup>67</sup>

General counsel with the firm's risk management partner and human resources personnel should periodically monitor conduct to determine if the firm is following its own policies.<sup>68</sup> As a final step in the audit, the general counsel or risk management partner should study the firm's insurance policies to confirm that adequate coverage is provided for employment related claims.<sup>69</sup> Firm general counsel should also be prepared to address lawyer impairment and disability issues. Although the organized bar has implemented law assistance programs, impairment among law firm lawyers has largely been treated as the profession's secret.<sup>70</sup> This situation changed in 2003 when the ABA Professional Ethics Committee issued an opinion dealing with the ethical responsibilities of firm lawyers who know that a colleague is suffering from an impairment.<sup>71</sup> The opinion explains that the firm partners and supervisors of an impaired lawyer must take steps to assure the impaired lawyer's compliance with the disciplinary rules.<sup>72</sup> The opinion also addresses when firm lawyers have a duty to report ethics violations by the impaired lawyer.<sup>73</sup>

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policies and practices," see Dominick Bratti, *Short Circuit Claims*, LawFirmInc.com, at <http://www.lawfirminc.com/texts/shortcircuit.html> (last visited Mar. 17, 2005).

67. Berkowitz, *supra* note 57, at 5.

68. The alleged failure of Baker & McKenzie to follow its own policy may have contributed to the large punitive damage award in favor of the legal secretary who sued the firm. See Rena Weeks, *The Price of Harassment*, Law Firm Inc. (wherein the plaintiff criticizes the firm for failing to follow its own employee handbook), at <http://www.lawfirminc.com/texts/renaweeks.html> (last visited Mar. 17, 2005).

69. Although Employment Practices Liability may be obtained through an endorsement to the firm's management liability, the risk of doing so is that the employment liability claim may deplete limits for management related claims. For that reason, the firm should consider a separate Employment Liability policy. Karen Dean, *Proceed with Caution*, Law Firm Inc., at <http://www.lawfirminc.com/texts/1004/inurance1004.html> (last visited Mar. 17, 2005).

70. For a listing of state and local bar association disability and assistance groups, see ABA Commission on Mental and Physical Disability Law, at [http://www.abanet.org/disability/links\\_new.html](http://www.abanet.org/disability/links_new.html) (last visited Mar. 17, 2005).

71. ABA Comm. on Ethics & Professional Responsibility, Formal Op. 03-429 (2003). For a commentary on the opinion, see Eileen Libby, *Sharing the Consequences: A Lawyer's Mental Impairment Raises Ethics Issues for Other Members of the Firm*, A.B.A. J., July 2003, at 32.

72. *Id.* at 4.

73. *Id.* at 3-4.

In directing the firm's response to impaired lawyers, general counsel should heed the opinion's recommendations on implementing policies and procedures and taking remedial action when warranted.

In addition to dealing with professional responsibility issues related to lawyer impairment, general counsel can also play a proactive role in advising the firm on employment law issues related to disabilities deserving protection under the Americans with Disabilities Act (ADA).<sup>74</sup> Firms may not realize that the ADA may apply to firm principals, as well as firm employees, depending on the structure and size of the firm.<sup>75</sup>

Under the ADA, the principal concern is whether the employer makes reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual.<sup>76</sup> For law firms the greatest compliance challenge may be accommodating mental impairments suffered by otherwise qualified lawyers.<sup>77</sup> One employment law expert explains that this kind of impaired lawyer problem is rarely addressed by law firms.<sup>78</sup> During the next few years, data suggest that firm managers may be forced to deal with impaired lawyers, including impaired peers.<sup>79</sup> How will management respond when an impaired lawyer requests accommodations such as lower billable hours, more time off, or no evening or weekend hours as a means of decreasing stress and dealing with dis-

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74. For an overview of ADA compliance issues for law firms, see John J. Balitis Jr., *Liability for Unsuspecting Law Firms*, ARIZONA ATTORNEY, Oct. 1995, at 24.

75. Although the ADA generally applies to employees, law firm partners may have standing to assert ADA claims depending on the size and structure of the law firm. See David Rapaport, *When the Law Firm Is the Defendant Lawyers Need To Learn How to Handle Disability-Discrimination Claims From Their Own Employees*, LEGAL TIMES, Mar. 11, 1996, at 17 (referring to cases recognizing the right of certain partners to assert ADA claims).

76. To be qualified, a person must be qualified for the position or job in question and able to perform the "essential functions of the employment position that such individual holds or desires," with or without reasonable accommodation. Americans with Disabilities Act, 42 U.S.C. § 12111(8) (2003).

77. See Rapaport, *supra* note 75, at 17 (suggesting that emotional disabilities, such as depression, may be harder for firms to deal with because the nature of the impairment is somewhat "amorphous" when compared to physical disabilities). "Persons with mental disabilities, substance abuse or alcoholism are protected under the ADA if they are 'otherwise qualified' to perform the 'essential functions' of the job." Joseph W. Caldwell, *Lawyers, Alcohol, Drugs, and the ADA*, 9 W. VA. LAW. 20, 20, (July 1996).

78. Paula A. Barran, Professional Responsibility and Law Firm Management: Managing Lawyer Impairment, Address at the ABA 22nd National Conference on Professional Responsibility, Tab 2 (May 30-June 1, 1996) (providing guidance on managing lawyer impairment) (conference material on file with author).

79. Studies reveal that a significant, and possibly growing, percentage of lawyers suffer from depression, substance abuse, or alcoholism. See Caldwell, *supra* note 77 (referring to one study where approximately 20% of lawyers in certain states suffered from statistically significant levels of depression and another study in which 18% of Washington lawyers who had practiced two to twenty years had developed problem drinking).



abilities recognized under the ADA?<sup>80</sup> Unlike requests for accommodations for physical disabilities, the request for a reduced workload and alternative schedule presents a real dilemma for firms because such accommodations “cut at the core of firms’ revenue production.”<sup>81</sup> Rather than reacting after a request or problem arises, law firms should adopt a personnel impairment policy and address disability issues in the firm’s partnership agreement or its counterpart.<sup>82</sup> Informed general counsel can guide firms in adopting such a policy to assist lawyers and support personnel suffering from emotional or behavioral problems.<sup>83</sup>

## V. CONCLUSION

The discussion of challenges facing firms reveals that firms of all sizes can benefit from the services of a general counsel who devotes time to the firm’s own legal affairs. The amount of time devoted by the general counsel largely depends on firm size, needs, and other management structures. Although the actual structure and duties of the general counsel will vary from firm to firm, the basic concept remains the same—the general counsel serves as a lawyer’s lawyer. No longer will the shoemaker’s children go without shoes. Rather the general counsel as the lawyer’s lawyer guides the firm before the firm and its lawyers get in legal hot water.

For this reason, I see a general counsel of a firm like a Sherpa who guides and supports climbers in the Himalayas. In trekking in the Himalayas, climbers can go the “smart way,” relying on a guide for assistance in identifying the best course to avoid problems. The foolish approach is to forge into the mountains and hope for rescue after the climbers encounter problems. In the Himalayas, Sherpas save lives. In law practice, general counsel as Sherpas guide firm lawyers in avoiding and addressing various legal and organizational challenges. Firms that designate and support a general counsel should see that the investment is a good business decision in terms of loss prevention, quality client service, and law-

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80. See Anne Melissa Rossheim, *Firms Seem Less Prepared Than Their Clients for New Disability Law*, OF COUNSEL, Feb. 3, 1992, at 14, 16 (quoting Robert Duston, a Washington, D.C. labor lawyer).

81. *Id.*

82. See George E. Bailly, *Impairment, The Profession and Your Law Partner*, ME. B.J., Apr. 2000, at 96 (explaining the advantages of advance planning and suggesting specimen language for a partnership agreement).

83. In formulating a policy and guidelines, firms should consult the ABA Model Law Firm/Legal Department Personnel Impairment Policy and Guidelines, dated August 1990, at <http://www.abanet.org/legalservices/downloads/colap/modellawfirm.pdf> (last visited Mar. 17, 2005).

yer satisfaction. In the changing legal landscape of modern firm practice, general counsel who proactively tackle difficulties and challenges may distinguish successful and thriving firms from those that flounder and eventually dissolve.

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